UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10372
Summary Calendar

GERARD HENNESSEY, Plaintiff-Appellant,

LINDA ANN VEGA, Appellant,

versus

L. J. BLALACK, et al., Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(5:93-CV-78-C)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges. PER CURIAM:[1]

Hennessey appeals the dismissal of his RICO claims against L. J. Blalack, a former justice of the peace for Lubbock County, Texas, and other Lubbock County officials. Hennessey's complaint alleges that Lubbock County officials operated a corrupt enterprise through which excessive fines were funnelled to them in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

("RICO"). The district court entered Rule 54(b) orders dismissing most of the defendants and dismissing some of Hennessey's claims against the remaining defendants, including the RICO claim. The court subsequently entered summary judgment on the remaining claims. The court also denied Hennessey's motions to certify a class action and to disqualify the district judge. Hennessey subsequently filed numerous appeals of the district court's Rule 54(b) orders. The principal issue Hennessey raises in this appeal is whether the district court erred in dismissing the RICO claims and denying his motions.

We conclude that Hennessey's arguments in this appeal are frivolous. A frivolous appeal is an appeal in which "the result is obvious or the arguments are wholly without merit." **Coghlan v. Starkey**, 852 F.2d 806, 811 (5th Cir. 1988). The arguments Hennessey makes in this appeal are those we resolved in a previous unpublished decision, **Hennessey v. Blalack**, Nos. 93-1808, **etc.** (5th Cir. Aug. 30, 1994) ("**Hennessey I**"). In **Hennessey I** we affirmed the district court's orders at issue in the present appeal. Under the "law of the case" doctrine, Hennessey's arguments raising the same issues that we have already resolved in a previous decision are foreclosed. **Chevron U.S.A., v. Traillour Oil Co.,** 987 F.2d 1138, 1150 (5th Cir. 1993). Hennessey's arguments are thus wholly without merit. Accordingly, we DISMISS his appeal and, in view of the large number of Hennessey's appeals still pending in this court, we take this occasion to warn Hennessey that any additional frivolous appeals filed by him or on his behalf will be met with an appropriate sanction under Federal Rule of Appellate Procedure 38. To avoid sanctions, Hennessey should review all of his pending appeals to ensure that they do not raise arguments already resolved by this court.

DISMISSED.

U.S. COURT OF APPEALS
FILED
FEB 02 1995
CHARLES R. FULBRUGE III, CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10373
Summary Calendar

GERARD HENNESSEY, Plaintiff-Appellant
LINDA ANN VEGA, Appellant,

versus

L. J. BLALACK, et al., Defendants,
L. J. BLALACK, Defendant-Appellee.

****

GERARD HENNESSEY, Plaintiff-Appellant,
L. J. BLALACK, et al., Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(5:93-CV-78-C/5:94-CV-074-C)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[2]

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[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Hennessey appeals the dismissal of his **pro se** § 1983 complaint against L. J. Blalack, a former justice of the peace for Lubbock County, Texas. We affirm.

I.

Hennessey's claims against Blalack arose from an altercation occurring in Blalack's courtroom. Hennessey sought access to complaints filed in Blalack's court by a local attorney. After a heated exchange between Hennessey and Blalack, Blalack charged Hennessey with contempt and requested a deputy sheriff to place him in custody. Before Blalack was escorted out of the courtroom, however, Blalack withdrew the contempt citation and instructed the bailiff to release Hennessey. Blalack later instructed his court clerks to prepare affidavits stating that Hennessey had been loud and abusive. Several clerks subsequently informed law enforcement officers that Blalack "coached" their affidavits. Blalack was later indicted for perjury and false arrest.

Hennessey's § 1983 complaint alleges that Blalack's contempt citation violated Hennessey's constitutional rights and that Blalack conspired with his court clerks to deprive him of his constitutional rights by preparing false and defamatory affidavits. Hennessey's complaint further alleges that other state and Lubbock County officials conspired to prevent him from successfully petitioning for Blalack's removal from office and that Lubbock County officials were operating enterprise through which excessive fines were funnelled to them in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 (RICO).

The district court entered Rule 54(b) orders dismissing most of the defendants and dismissing some of Hennessey's claims against the remaining defendants, including Hennessey's RICO claim. The district court then granted summary judgment against Hennessey on the remaining claims. Hennessey filed numerous appeals of the district court's Rule 54(b) orders dismissing claims and defendants. In a previous unpublished decision, **Hennessey v. Blalack**, Nos. 93-1808, **etc.** (5th Cir. Aug. 30, 1994) ("**Hennessey I**"), we affirmed the

district court's dismissal of the claims against the court clerks and county officials. We also affirmed the district court's dismissal of Hennessey's RICO claim. The primary issue raised by the present appeal is whether the district court erred in granting Blalack summary judgment on the basis of judicial immunity.

II.

A.

Hennessey first contends that the district court erred in concluding that Blalack was entitled to judicial immunity for the contempt citation. Judges presiding over courts of general jurisdiction are absolutely immune from damage suits for "judicial acts" provided that they do not act in "clear absence of all jurisdiction." **Stump v. Sparkman**, 435 U.S. 349, 356-57 (1978). Judicial immunity extends to justices of the peace even though they do not exercise "general jurisdiction." **Brewer v. Blackwell**, 692 F.2d 387, 396 (5th Cir. 1982). Whether an act is judicial in nature turns on following factors: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. **Malina v. Gonzales,** 994 F.2d 1121, 1124 (5th Cir. 1993).

Hennessey first argues that Blalack is not entitled to judicial immunity because the contempt citation was not judicial

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Hennessey's brief also discusses many of the claims of error decided by this court in **Hennessey I**, including Hennessey's claims that (1) the district court erred by denying his RICO claim before discovery had been completed, (2) the district court erred in denying his motion for class certification, and (3) the district court erred in refusing to allow the joinder of claims brought by Linda Ann Vega. To the extent that Hennessey seeks to reargue these claims, our decision in **Hennessey I** constitutes the "law of the case." Consequently, we need not reexamine Hennessey's arguments. **See Chevron U.S.A., Inc. v. Traillour Oil Co.**, 987 F.2d 1138, 1150 (5th Cir. 1993).

in nature. According to Hennessey, he did not appear before Blalack on a judicial matter and was not a party to any of the cases pending in Blalack's court. In response, Blalack argues that contempt citations are inherently judicial because they implicate a judge's power to supervise and maintain order in the courtroom.

We agree that Blalack's contempt citation was a judicial act under the criteria set out in **Malina**. First, contempt citations are "normal judicial functions." **Malina**, 994 F.2d 1121. Moreover, the incidents precipitating the contempt citation occurred in Blalack's courtroom and involved Hennessey's attempt to obtain information concerning several complaints filed in Blalack's court. Finally, Hennessey's contention that the contempt citation did not arise out of a visit to Blalack in his official capacity is meritless. As justice of the peace, Blalack was officially responsible for maintaining the records of the court. **See Tex. Gov't Code Ann.** § 27.004 (Vernon 1988). Consequently, Hennessey's appearance before Blalack in his courtroom should have placed Hennessey on notice that he was appearing before Blalack in his official capacity as justice of the peace. **See Harper v. Merckle**, 638 F.2d 848, 859 (5th Cir.), **cert. denied**, 454 U.S. 816 (1981) (concluding that the parties' expectations should be considered in deciding whether an appearance before a judge is in the judge's official capacity).

Hennessey also argues that Blalack lacked jurisdiction to issue the contempt citation because he did not provide Hennessey with notice or hold a hearing before citing him with contempt. This argument is similarly without merit. In **Ex parte Krupps**, 712 S.W. 2d 144, 146-48 (Tex. Crim. App.), **cert. denied, Krupps v. Texas**, 479 U.S. 1102 (1987), the Texas Court of Criminal Appeals held that a contempt citation based on actions occurring in the presence of the court does not require prior notice or a hearing. Accordingly, neither notice nor a hearing was required under Texas law because the events leading up to the contempt citation occurred in Blalack's presence.

Finally, Hennessey contends that the district court erred in granting summary judgment on the basis of Blalack's sworn affidavit because Blalack was indicted for perjury. Hennessey

also alleges that Blalack's affidavit "conflicts substantially" with the affidavits offered by the other defendants. This claim is similarly without merit. The facts necessary to decide whether Blalack is entitled to judicial immunity are largely undisputed and appear in the allegations of Hennessey's complaint. While Hennessey asserts that Blalack's affidavit conflicts with the other affidavits, he fails to specifically identify any disputed facts relevant to deciding whether judicial immunity applies to Blalack's actions. "Factual disputes that are irrelevant or unnecessary will not be counted" in deciding whether the parties' affidavits create a genuine issue of material fact. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 248 (1986). Therefore, we conclude that the district court did not err in granting summary judgment as to the contempt citation based on judicial immunity.

B.

Hennessey also contends that the district court erred in granting summary judgment without considering whether Blalack was entitled to judicial immunity for ordering his court staff to prepare allegedly false and defamatory affidavits. Hennessey contends that Blalack is not entitled to immunity because the preparation of the affidavits was not a "judicial act." Rather, Hennessey alleges that Blalack ordered his staff to prepare the affidavits to thwart a state investigation of his conduct.

We need not decide whether Blalack is entitled to judicial immunity for his actions because Hennessey fails to show that the preparation of the affidavits deprived him of a recognized liberty or property interest within the purview of the Fourteenth Amendment. **Doe v. Taylor Indep. School Dist.**, 15 F.3d 443, 450 (5th Cir.,) **cert. denied**, ___U.S.---, 115 S. Ct. 70 (1994). Hennessey argues that the affidavits humiliated him and defamed his reputation, and that Blalack used the affidavits to obstruct an official state investigation. However, the "invasion of an interest in reputation alone is insufficient to establish § 1983 liability because a damaged reputation, apart from injury to a more tangible interest such as loss of

employment, does not implicate any 'liberty' or 'property' rights sufficient to invoke due process." **Geter v. Fortenberry**, 849 F.2d 1550, 1556 (5th Cir. 1988) (citation omitted).

Hennessey does not allege that Blalack used the affidavits to diminish his employment opportunities or to harm any other tangible interest. Furthermore, while the use of perjured testimony to facilitate an adjudication of guilt may give rise to a claim under § 1983, Hennessey does not allege that Blalack used the affidavits to facilitate an adjudication of guilt. **See Johnson v. Odom**, 910 F.2d 1273, 1277 (5th Cir.), **cert. denied**, 499 U.S. 936 (1991). We conclude, therefore, that the district court did not err in granting Blalack summary judgment.

AFFIRMED.

U.S. COURT OF APPEALS
FILED
JAN 26 1995
CHARLES R. FULBRUGE III, CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10530
Summary Calendar

GERARD HENNESSEY,

Plaintiff-Appellant,

LINDA ANN VEGA,

Appellant,

VERSUS

L. J. BLALACK, et al.,

Defendants,

J. DAVID NELSON,

Defendant-Appellee.

****

GERARD HENNESSEY,

Plaintiff-Appellant,

VERSUS

J. DAVID NELSON,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(5:93-CV-78-C & 5:94-CV-112)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges. PER CURIAM:

Gerard Hennessey appeals the dismissal of his § 1983 and RICO claims against J. David Nelson. We affirm.

I.

Hennessey's claims against J. David Nelson, a Lubbock County, Texas attorney, center on Nelson's efforts to collect various debts from Hennessey's daughter on behalf of a local retailer. Hennessey suspected that Nelson's collection efforts violated the Fair Debt Collection Practices Act ("FDCPA"), and that they were part of a larger racketeering enterprise operated by Nelson and Lubbock County officials. In October 1989, Hennessey sought court records from Bill Ross, a Lubbock County justice of the peace, documenting Nelson's debt collection practices. Although Nelson objected to Hennessey's request, Ross released the documents.

In April 1991, Hennessey sought additional court records from L.J. Blalack, another Lubbock County justice of the peace. After a heated exchange between Hennessey and Blalack, Blalack charged Hennessey with contempt and requested a deputy sheriff to place him in custody. Before Hennessey was escorted out of the courtroom, however, Blalack withdrew the contempt citation and instructed the bailiff to release him.

Hennessey responded by filing a § 1983 complaint against Blalack, Blalack's court personnel, Nelson, and

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Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

numerous other Lubbock County officials alleging that they violated his constitutional rights. Hennessey further alleged that these defendants operated a corrupt enterprise designed to extort excessive fines and engage in illegal debt collection practices in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 ("RICO").

The district court entered Rule 54(b) orders dismissing most of the defendants and dismissing some of Hennessey's claims against the remaining defendants, including Hennessey's RICO claim against Nelson and the county officials. The district court then granted summary judgment against Hennessey on the remaining claims. In the present appeal, Hennessey challenges the district court's dismissal of his § 1983, RICO, and pendent state law claims against Nelson. He also challenges the district court's denial of his motion to certify a class action on behalf of county residents harmed by the defendant's alleged RICO violations.

II.

A.

Hennessey first contends that the district court erred by dismissing his § 1983 claims against Nelson. Hennessey alleges two grounds for his § 1983 claims against Nelson. First, Hennessey alleges that Nelson interfered with his constitutional right of access to public records by objecting to his request for court documents from Judge Ross. Second, Hennessey alleges that Nelson made disparaging remarks about him to other attorneys in an effort to prevent him from obtaining legal representation for his daughter. The district court concluded that Hennessey failed to assert a violation of any constitutionally protected right and dismissed his § 1983 claims. The court also concluded that Hennessey's § 1983 claims are barred under Texas' two-year statute of limitations for personal injury claims.

Our review of the record persuades us that Hennessey's § 1983 claims against Nelson are barred by Texas' two-year statute of limitations. In determining whether a § 1983 claim is

barred by the statute of limitations, federal courts refer to the forum state's general personal injury limitations period. **Ali v. Higgs**, 892 F.2d 438, 439 (5th cir. 1990). Texas' applicable limitations period for personal injury claims is two years. Tex.Civ.Prac. & Rem.Code Ann. § 16.003(a)(Vernon 1986). Hennessey filed his § 1983 claims against Nelson in April 1993. However, the incidents alleged in Hennessey's § 1983 complaint occurred more than two years before he filed his complaint. Nelson's attempt to prevent Hennessey from obtaining records from Judge Ross occurred in 1989. The disparaging remarks cited in Hennessey's complaint similarly occurred in 1989.
[5] Because the record does not reveal any basis for tolling the statute of limitations, Hennessey's § 1983 claims against Nelson are barred.

B.

Hennessey next contends that the district court erred by dismissing his RICO claim against Nelson and denying his motion to certify a class action.
[6] Both arguments are without merit. We resolved these issues in a previous unpublished decision, **Hennessey v. Blalack**, Nos. 93-1808, **etc.** (5th Cir. Aug. 30, 1994) (**"Hennessey I"**). In **Hennessey I**, we concluded that Hennessey lacked standing to sue under RICO and affirmed the district court's dismissal of his claims. We also affirmed the district court's denial of

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5 The only other incident involving Hennessey's attempt to obtain public records is the 1991 altercation involving Judge Blalack. However, Hennessey fails to allege any facts connecting Nelson with the altercation. Hennessey filed a separate § 1983 action against Judge Blalack alleging that the judge barred his access to public records.

6 Hennessey alleges that Nelson participated in the county officials' RICO enterprise by pursuing unlawful debt collection practices. Hennessey cites alleged violations of the FDCPA and the Hobbs Act as examples of Nelson's racketeering activities.

Hennessey's motion to certify a class action. Under the "law of the case" doctrine, Hennessey cannot raise arguments that we have already resolved in a previous decision. **Chevron U.S.A., v. Traillour Oil Co.,** 987 F.2d 1138, 1150 (5th Cir. 1993).

C.

Finally, Hennessey contends that the district court erred by not retaining supplemental jurisdiction over his state law claims against Nelson. This argument is similarly without merit. Under 18 U.S.C. § 1367(3), a district court may dismiss pendent state law claims if the court has dismissed "all claims over which it has original jurisdiction." District courts enjoy wide discretion in dismissing pendent state law claims under § 1367(3). **Noble v. White,** 996 F.2d 797, 799 (5th Cir. 1993). Hennessey fails to show that the district court's dismissal of his state law claims wasted judicial resources or otherwise prejudiced him. In fact, the court's dismissal occurred at an early stage in the proceedings before either party had engaged in extensive discovery. The district court did not, therefore, abuse its discretion by dismissing Hennessey's pendent state law claims.

III.

For the reasons stated above, we AFFIRM the district court's dismissal of Hennessey's § 1983 and RICO claims against Nelson. Nelson also filed a motion to strike references in Hennessey's brief to facts not in the record. Specifically, Nelson objects to Hennessey's references to campaign contributions that Nelson made to L.J. Blalack. References in a party's brief to matters outside the record may be stricken. **Holmberg v. Baxter Healthcare Corp.,** 901 F.2d 1383, 1392 n.4 (7th Cir. 1990). Accordingly, we GRANT Nelson's motion to strike Hennessey's references to Nelson's campaign contributions.

AFFIRMED; Motion Granted.

U.S. COURT OF APPEALS

FILED, MARCH 2, 1995,

NO. 07-94-0199-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

MARCH 16, 1995

MELISSA MARTIN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE COUNTY COURT AT LAW #1 COURT OF LUBBOCK COUNTY; N0. 93-493,663; HONORABLE WILLIAM C. DODSON, JUDGE

Before REYNOLDS, C.J., and BOYD and QUINN, JJ.

The Appellant, Melissa Martin, asks whether a written statement lacking the elements of an affidavit may support a perjury conviction. We answer yes and affirm.

FACTS

On January 8, 1993, the grand jury for the 365th Judicial District indicted the Appellant for intentionally and knowingly making two inconsistent statements under oath. The first, written on April 9, 1991, stated that a Gerard Hennessey was "belligerent and argumentative" during a meeting with Justice of the Peace, L.J. Blalack while the second, executed on December 3, 1992, explained that Hennessey was "not loud, abusive or rude but was irate...over bearing [sic] pushy and...arrogant..."

Blalack had apparently had a set-to with Hennessey, held the layman in contempt, and then rescinded the edict. Worried that Hennessey may nevertheless file a grievance, the Justice of the Peace requested the Appellant, who worked in Blalack's office, and other clerks to compile written statements memorializing their perception of the event. He further directed them to incorporate into the documents adjective describing Hennessey as "argumentative, belligerent, [and] abusive."

The Appellant acquiesced. Upon completing hers, she signed the document. Debra Chambers, a notary public, affixed her name to the right of the Appellant's then stamped her seal of office within the lower right-hand margin. Absent, however, were a jurat or other written words declaring that the Appellant uttered the statement under oath. Because of this, she moved to suppress the document as irrelevant. The trial court denied the motion.

When the cause eventually came for trial, the parties stipulated that:

Debra Chambers would testify that she made me swear that the statement notarized on April 9, 1191, was true, accurate and correct. Furthermore, that Debra Chambers would state that she is a licensed notary for the State of Texas, and

Jim Mull, Texas Ranger, would testify that I gave him a sworn [written] statement [the second statement] stating that my statement of April 9, 1991 was not absolutely the truth.

The trial court found this sufficient to convict and assessed her community supervision and deferred adjudication.

POINTS OF ERROR

In four points of error, the Appellant contends that in situations where perjury is founded upon a written statement, the statement must be nothing less that an affidavit. Since the April 9th statement was not an affidavit it was irrelevant and inadmissible. We disagree and, before explaining why, note that which no one disputes.

First, all agree that the Appellant wrote the April 9th statement. All agree that the December 3rd writing, which met the formalities of an affidavit, contradicted portions of the April 9th document. Furthermore, no one suggests that the items contradicted were expressions of opinion rather than the fact. That Chambers was a notary is also uncontroverted. With this said, we turn to the penultimate issues which involve the interpretation of §37.02 of the Texas Penal Code.

a. Standard of Review

Issues of statutory construction are questions of law. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). Thus, the interpretation accorded by the lower court is freely reviewable. Yet, there are several basic rules to which all must adhere. The first requires the court to derive the legislative intent underlying the statute and to interpret same commensurate with that intent. *Leonard v. State*, 767 S.W.2d 171, 176(Tex. App.–Dallas 1988) *affirmed sub. nom, Schalk v. State*, 823 S.W.2d 633 (Tex. Crim. App, 1991). The next rule compels the court to read the provision as written without expanding, inserting or deleting words. *Id.; State v. Hatten*, 600 S.W.2d 828, 830 (Tex. Crim. App. 1980). Finally, should material terms lack express statutory definition, the reviewing body must accord those words their plain meaning. *Casillas v. state*, 733 S.W.2d 158, 163(Tex. Crim. App. 1986).

b. What's a Statement

One commits perjury upon making a false statement under oath or swearing to the truth of a false statement previously made when the statement is required or authorized by law to be made under oath. *Tex. Pen. Code Ann* §37.02(a)(1) (Vernon 1994). Furthermore the individual must act with the intent to deceive and know the meaning of the statement uttered. *Id.* at §37.02(a).

Adopted in 1974, §37.02 combined the district crimes of perjury and false swearing. *Tex. Pen Code Ann.* §37.04, Practice Commentary (Vernon 1974). Though virtually identical, they deviated in one important respect, the motivation for the oath. *Tex. Pen. Code* art. 302 & 310 (Vernon 1974) (repealed); *City of San Antonio v. Poulus*, 422 S.W.2d 140, 143-44 (Tex. 1967) (discussing the elements of both); *Commercial Casualty Ins. Co. v. Holmes*, 206 S.W.2d 882, 884 (Tex. Civ. App.–Austin 1947, writ ref'd n.r.e.) (discussing the elements of both). If the oath taken was mandated by law, the falsehood constituted perjury, if not, it was false swearing. *Id.; Steher v. State*, 4 S.W. 880, 881 (Tex. App, 1887); *Davidson v. State*, 3 S.W. 662, 663-64 (Tex. App. 1886). For example, one committed false swearing by

attesting, to obtain a marriage license, to a county clerk that he was the age of majority, when in fact he was not. *Davidson v. State, supra.* Under that circumstance an oath was not a prerequisite to securing the license, though the clerk was authorized to administer it. On the other hand, lying in a affidavit to secure a search warrant would be perjury since an affidavit, with its attendant oath, was a legal perquisite to securing the warrant. *Tex. Code Crim. Proc. Ann.* art. 18.01(b) (Vernon 1977). Nevertheless, by enacting §37.02 of the Penal Code, the legislature sought to vitate the difference inherent in the old law and criminalize as perjury "all [false] statements authorized to be made under oath whether or not an oath is required by law." *Tex. Pen. Code Ann.* §37.04, Practice Commentary (emphasis added).

More importantly, gone was the expressed reference to the word "affidavit." Under article 310 of the old code, the false statement prohibited by the legislature consisted of a "declaration or affidavit." *Tex. Pen. Code* art. 310; *see Rives v. State,* 296 S.W. 577, 578 (Tex. Crim. App. 1927) (stating that the "offense denounced contemplate[d] a false swearing by writing or affidavit of a thing, past or present"). Now, "any representation of fact" constitutes a statement. *Tex. Pen. Code Ann.* §37.01(3) (Vernon 1994). In adopting that definition, the legislature liberated the term from the restrictive formalities accompanying an "affidavit" and expanded the category or utterances potentially criminal.

Yet, the Appellant argues differently. She believes that "statement" means something less than any "representation of fact" when the false representation is contained in a written document. In that situation, she concludes, the document must have the attributes of an affidavit otherwise it would not be a sworn statement. The

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[1] An affidavit consists of a writing signed by the party making it, sworn to before an officer authorized to administer oaths and certified by said officer under seal of office. *Tex. Gov. Code Ann.* §321.011(1) (Vernon 1988).

argument is baseless for several reasons.

First, had the legislature intended to restrict perjury to false affidavits when a writing was involved, it would not have deleted the word from the recodified statute. Indeed, the legislature retained the term in related areas such as §18.01(b) of the Texas Code of Criminal Procedure. There it pronounced that search warrants could issue only upon "affidavit" establishing probable cause. Including "affidavit" in §18.01(b) while redacting it from the perjury statute discloses a legislative intent contrary to the Appellant's belief.

Second, in arguing as she does, the Appellant misconceives the nature of an oath and affidavit. The former, though not defined by statute, is a pledge to act in a truthful and faithful manner *Vaughn v. State*, 177 S.W.2d 59, 60 (Tex. Crim. App. 1943).
[2]This pledge is made manifest through an "unequivocal act by which [the individual] consciously takes upon himself the obligation of an oath" before someone authorized to administer an oath. *Lowry v. State,* 297 S.W.2d 848, 850(Tex. Crim. App, 1956); *Vaughn v. State*, 177 S.W.2d at 60. Thus, simply pledging to act truthfully and faithfully before someone authorized to administer oaths constitutes a valid oath. For instance, one orally pledging to the truthfulness "of statements made or to be made" confirms, by oath, the veracity of those statements. *Marsden v. Troy,* 189 S.W. 960, 964(Tex. Civ. App.--San Antonio 1916, no writ)(distinguishing between an oath and affidavit).

An affidavit is simply another way to manifest an oath. It is a pledge in written form, *Marsden v. Troy,* 189 S.W. at 964, constituting prima facie evidence that an oath was taken. *Order of Aztecs v. Noble,* 174 S.W. 623, 624(Tex. Civ. App.--Austin 1915, no writ)(dealing with a jurat). That

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2 Statute does, however, include "affirmation" within the scope of an oath. *Tex. Pen. Code Ann* §1.07(32) (Vernon 1994). Thus, one affirming an act has taken an oath.

its formalities were not met does not negate the existence of the oath; it merely vitiates the use of the instrument as proof that an oath was taken. Often, one may present other evidence to prove that particular statements were sworn to in spite of the defective instrument. *See e.g., King v. State,* 320 S.W.2d 677, 678(Tex. Crim. App. 1959)(holding that in absence of a jurat, the fact that the statement was sworn to may be shown by other evidence). Here, for example, the stipulation executed by the parties evidenced that the Appellant orally pledged to the veracity of her April 9th statement.

Mixing legislative history and case law with the plain meaning of the perjury statute, we determine that the written document created by the Appellant fell within the parameters of §37.02(a). It need not have been a affidavit. Moreover, it is not within our perview to amend the provision to mean something other than that intended by the legislature. *Leonard v. State,* 767 S.W.2d at 176.

c. Must Some Third-Party See or Rely on the Statement

The Appellant next argues that her statement could not fall within §37.02(a) since no one saw or relied upon it. She is mistaken.

The Appellant admitted in her December 2, 1992, sworn declaration that Blalack feared "Hennessey might make a complaint against him to the Judicial Conduct Commission." This spurred him to protect himself. In doing so, he not only "ordered all...clerks to write out statements" but also told the Appellant what to say. After completing hers, and knowing portions thereof to be false, she swore to its accuracy before a notary public. At that instant, the crime became choate. *Welch v. State,* S.W. 946, 946-47 (Tex. Crim. App, 1913). There was no need for anyone else to see or rely upon the document. *Id.*

d. Was the Oath Required or Authorized by Law

In her concluding paragraph under Points One, Two

and Three, the Appellant closed by saying that the "written statement is not a statement 'required or authorized by law to be made under oath.'" We again disagree.

The stipulations evinced that Chambers was a notary public. As such, she was authorized by law to administer oaths. *Tex. Gov. Code Ann.* §406.016(a) (Vernon 1990). Her authority did not wane because nothing required the Appellant to act under oath. *Campbell v. State,* 68 S.W. 513, 514(Tex. Crim. App. 1902)(holding that a notary has authority to swear persons whether it be to necessary affidavits and those required by law or those which are purely voluntary). Thus, the oath was one authorized by law.

e. Relevance of the April 9th Statement

The Appellant finally contends, in her discussion of all four points, that the April 9th statement was irrelevant under both Rules 402 and 403 of the Texas Rules of Criminal Evidence. The sole ground underlying the argument concerns whether the statement fell within the parameters of §37.02(a)(1) of the Penal Code. Since it did not, according to the Appellant, it was inadmissible and highly prejudicial. Yet, as previously developed, it was one contemplated by the statute. The Appellant having assigned no other basis on which to exclude the document, the trial court properly allowed same.

Accordingly, the order assessing community supervision and deferring adjudication is affirmed and the four points of error overruled.

Brian Quinn
Justice

Publish. *Tex. R. App. Proc.* 90(c).

FILED FOR RECORD
MAR 17 420PM'95
/s/Ann Davidson
County Clerk Lubbock County, Texas

Melissa Martin, Appellant	§	From the County Court at Law #1 Court of Lubbock County
v. No. 07-94-0199-CR	§	March 16, 1995
The State of Texas, Appellee	§	Opinion by Justice Quinn

JUDGMENT

The cause came on to be heard and because it is the opinion of this Court that no error occurred, it is ordered, adjudged and decreed that the trial court order assessing community supervision and deferred adjudication be in all things affirmed.

It is further ordered, adjudged and decreed that appellant Melissa Martin pay all costs occasioned by this appeal, for which let execution issue.

It is further ordered, adjudged and decreed that this decision be certified for observance.

FILED FOR RECORD
MAR 17 4:20 PM '95
/s/Ann Davidson
County Clerk Lubbock County, Texas

----------[Document 1 P 93]----------

Lubbock County Grand Jury Indictments, January 8, 1993

.....93-416323.....

L. J. Blalack, Official Oppression of Gerard Hennessey
Filed January 8, 1993 in District Court Lubbock County
/s/ Wayne LeCroy
The State of Texas vs. L J Blalack
No. 93-416323 PID: 103287 DOB: 12/09/22
Misdemeanor Charge: OFFICIAL OPPRESSION
District Court No: 364th Bail Recommended: $2,000.00
Date Prepared: 01/08/93 Ref#: 359394 Agency/Rpt#: DPS
In the Name and by Authority of the State of Texas:

The duly organized Grand Jury of the District Court of Lubbock County, Texas, presents in and to said Court that in Lubbock County, Texas, L J BLALACK, hereafter styled the Defendant, heretofore on or about the 9TH DAY OF APRIL, 1991, did then and there intentionally subject GERARD HENNESSEY to arrest that the defendant knew was unlawful, and the defendant was then and there acting under color of his office as a public servant, namely, Justice of the Peace, Lubbock County, Texas;
AGAINST THE PEACE AND DIGNITY OF THE STATE.
/s/Modesto Esquivel Foreman of the Grand Jury
PRESENTED THIS 8 DAY OF JANUARY, A.D. 1993

.....93-416324.....

L.J.Blalack, Official Misconduct
Filed in District Court Jan. 8, 1993 /s/ Wayne LeCroy
The State of Texas vs. L J Blalack

NO. 93-416325 PID: 103287 DOB: 12/09/22
Felony Charge: AGGRAVATED PERJURY
District Court No: 364th Bail Recommended: $5,000.00
Date Prepared:01/08/93 Ref#: 359399 Agency/Rpt#: DPS
In the Name and by Authority of the State of Texas:

The duly organized Grand Jury of the District Court of Lubbock County, Texas, presents in and to said Court that in Lubbock County, Texas, L J BLALACK, hereafter styled the Defendant, heretofore on or about the 30TH DAY OF NOVEMBER, 1992, did then and there with intent to deceive and with knowledge of the statement's meaning, intentionally and knowingly make a false statement under oath, namely, that the sworn statements made by Rose Marie Chivers, Melissa Martin, and Julie Martin concerning the conduct of Gerard Hennessey on April 9, 1991, in the office and courtroom over which the defendant presided as Justice of the Peace for Lubbock County, Texas, were in fact true statements, such sworn statement made by the defendant being then and there required by law to be made under oath, while the said defendant was then and there under an oath administered by Terry D. McEachern, Special Prosecutor, Lubbock County, Texas, under the direction of Clark Barnett, Foreman of the Lubbock County, Texas Grand Jury for the 237th District Court, such statement being false in that the defendant instructed Melissa Martin, Rose Marie Chivers, and Julie Martin to make statements that the said Gerard Hennessey was loud, rude, and abusive in the office and courtroom of said defendant, when such statements were false and untrue, and such false sworn statement by the defendant was then and there made during, and in connection with, an official proceeding, to-wit: a Grand Jury investigation, and said false sworn statement was then and there material to such proceeding in that the defendant was under investigation by the said Grand Jury for official oppression;
AGAINST THE PEACE AND DIGNITY OF THE STATE.
/s/Modesto Esquivel, Foreman of the Grand Jury
PRESENTED THIS 8 DAY OF JANUARY, A.D. 1993

The duly organized Grand Jury of the District Court of Lubbock County, Texas, presents in and to said Court that in Lubbock County, Texas, L J BLALACK, hereafter styled the Defendant, heretofore on or about the 3RD DAY OF JANUARY, 1990, did then and there intentionally subject LINDA VEGA to arrest that the defendant knew were unlawful, and the defendant was then and there acting under color of his office as a public servant, namely, Justice of the Peace, Lubbock County, Texas;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/Modesto Esqivel, Foreman of the Jury

PRESENTED THIS 8 DAY OF JANUARY, A.D. 1993

.....93-416327.....

Melissa Martin, Perjury

Filed in District Court, Lubbock, County January 8, 1993

/s/ Wayne LeCroy

The State of Texas vs Melissa Martin

No. 93-416327 PID: 67656 Misdemeanor Charge: PERJURY

District Court No: 364th Bail: $2,000.00 Date Prepared: 01/08/93

Ref#: 359460 Agency/Rpt#: DPS

In the Name and by Authority of the State of Texas:

The duly organized Grand Jury of the District Court of Lubbock County, Texas, presents in and to said Court that in Lubbock County, Texas, MELISSA MARTIN, hereafter styled the Defendant, heretofore on or about the 9TH DAY OF APRIL, 1991, did then and there with intent to deceive and with knowledge of the statements' meanings, intentionally and knowingly make two inconsistent statements under oath, one of the two statements being necessarily false, the first of such statements being that Gerard Hennessey was belligerent and argumentative with Justice of the Peace L J BLALACK on April 9, 1991 in the Justice of the Peace courtoom, such sworn statement being then and there authorized by law to be made under oath, while the said defendant was then and there under an oath administered by Debra Chambers; Notary Public in and for

the State of Texas, and the second of such statements being that Gerard Hennessey was not belligerent or argumentative to L J BLALACK on April 9, 1991, such statement being then and there authorized by law to be made under oath, while the said defendant was then and there under an oath administered by Charlene Pinkerton, Notary Public in and for the State of Texas; AGAINST THE PEACE AND DIGNITY OF THE STATE.
/s/Modesto Esquivel, Foreman of the Grand Jury
PRESENTED THIS 8 DAY OF JANUARY, A.D. 1993